

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 30, 2007 Session

LAWRENCE A. DOSPIL v. BEHICE Y. DOSPIL

**Appeal from the Circuit Court for Davidson County
No. 04D-3472 Carol Soloman , Circuit Judge**

No. M2006-01596-COA-R3-CV - Filed November 8, 2007

The parties in this divorce action entered into a postnuptial agreement, entitled "Stipulation and Separation Agreement" (Agreement), in which they divided their property, assigned responsibility for payment of marital debt and provided for the support of the wife, Behice Y. Dospil, by the husband, Lawrence A. Dospil. The trial court found the Agreement to be valid and enforceable but modified and extended a provision in the Agreement requiring that husband provide medical insurance and awarded Ms. Dospil the sum of \$10,000.00 as alimony *in solido*. Mr. Dospil has appealed alleging the trial court erred in modifying the Agreement and Ms. Dospil has appealed asserting the trial court erred in finding the Agreement valid and enforceable. We affirm the trial court's finding that the Agreement is valid and enforceable, reverse the trial court's award of alimony *in solido*, and modify and remand the case to the trial court for further proceedings related to the modification of the provision of the Agreement relating to medical insurance.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed, in part,
Reversed, in part, and Remanded**

DONALD P. HARRIS, SR.J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Robert H. Plummer, Jr., Franklin, Tennessee, for the appellant, Lawrence A. Dospil.

Kimberly L. Reed-Bracey, Goodlettsville, Tennessee, for the appellee, Behice Y. Dospil.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Agreement

On September 24, 2003, the parties entered into the Agreement that recites:

Differences have arisen between the Parties as a result of which they have been living separate and apart since 09/1/2002 currently without chance of reconciliation, and it

is their desire to enter into this Agreement to settle all of the financial matters existing between them and all of the matters involving their separated status.”

The Agreement provided Mr. Dospil would pay Ms. Dospil spousal support in the amount of \$1,800.00 from November 1, 2003, through October 31, 2006, and in the amount of \$1,500.00 thereafter until the death of either party or if Mr. Dospil ceased to have full time employment the amount would be the greater of the sum stated or one-half Mr. Dospil’s military retirement pay. The Agreement also provided that so long as Mr. Dospil remained employed and the employer offered health care benefits, he would pay Ms. Dospil’s health care insurance premiums.

With regard to property division, the Agreement provided Ms. Dospil would receive \$25,000.00 from the sale of the parties’ Virginia residence or, if the total proceeds were less than \$47,000.00, one-half the proceeds. Mr. Dospil released any claim he might have to property in Turkey that Ms. Dospil had deeded to their children. Ms. Dospil was to receive one-half the value of Mr. Dospil’s 401(k) plan and one-half his interest in Renaissance Application Facility, LLC (RenTech), if he sold that interest, and Mr. Dospil was to receive one-half of the value of any business owned by Ms. Dospil in the country of Turkey, if she sold that business. Mr. Dospil agreed to be responsible for the payment of the debts of the parties which were being paid through the United States Bankruptcy Court for the Eastern District of Virginia incident to a Chapter 11 plan of reorganization. Any debts incurred by either party after the date of the Agreement would be the responsibility of the person incurring the debt.

Finally, the Agreement provided that if either party filed suit for divorce, the Agreement would be filed with the court and that the parties would request it be incorporated into the final decree. On December 1, 2004, Mr. Dospil filed a complaint for absolute divorce, along with a copy of the Agreement, requesting the trial court enforce the Agreement. Ms. Dospil moved the trial court to set aside the Agreement stating it failed to make a full and fair settlement based upon the current status of the parties and that she had signed it under duress.

b. Ms. Dospil’s testimony.

Behicey Dospil testified that she was 53 years of age at the time of trial. She had been married to Lawrence Dospil for 33 years. Mr. Dospil moved to Nashville in 2001. Mrs. Dospil stayed in Virginia because their youngest child was finishing his last year in high school. According to Ms. Dospil, she moved to Nashville in September 2003. The parties had sold their home in Virginia and auctioned some of their furniture. Mrs. Dospil was desirous of using some of the proceeds she received to buy a business in Turkey and had planned on going there to look for a business to purchase. According to Ms. Dospil, the day before she left, Mr. Dospil came home for lunch and as he was leaving handed her an envelope. He said “look at it and sign it” and then returned to work. The envelope contained the Agreement. Ms. Dospil testified that she phoned her husband and asked him about the Agreement. She related that he said they were going through some hard times and he wanted to make sure she was taken care of and the Agreement really did not mean anything. She also testified, however, that when she indicated she wanted someone to explain it to

her, he said that she was going to Turkey and if she didn't sign it, he would divorce her while she was gone and she would get nothing. She was leaving for Turkey the next day. As he was taking her to the airport, they stopped by a bank where they executed the Agreement before a notary public.

Ms. Dospil testified that she did not discuss the Agreement with an attorney or get advice from an attorney prior to signing the Agreement. She testified that she did later take the Agreement to an attorney in Virginia and, according to her, was advised not to sign it. Mrs. Dospil testified she did not believe the papers were drawn in contemplation of a divorce.

Pursuant to the Agreement, Ms. Dospil received \$20,000 from the sale of the parties Virginia residence. She used \$2500 of these proceeds to purchase an interest in a business in Turkey. Pursuant to the Agreement Mr. Dospil paid her \$1800.00 per month and her medical insurance. Ms. Dospil admitted she continued accepting the payments after her discussion of the Agreement with a Virginia attorney.

Ms. Dospil was a Turkish citizen when she met and married Mr. Dospil but is now a United States citizen. In the recent past, Ms. Dospil learned to make jewelry but as a result of working with her hands, has developed numbness in her fingers and wrists. She consulted a doctor about these symptoms two weeks prior to trial and was advised she might have carpal tunnel syndrome. She has also had arthritis in her knees that required surgery. She testified that she is asthmatic, has high blood pressure and suffers from allergies. She testified she was also on medication for depression.

Her work experience includes working as a dental hygienist and as a mail room clerk for an insurance company. She supervised a thrift shop at one military base to which Mr. Dospil was assigned and managed a snack bar at another. She has owned a boutique that sold ladies clothing and accessories and an interest in a video store.

c. Mr. Dospil's testimony

Mr. Dospil testified that he moved to Nashville on July 31, 2001, to work for RenTech. Mrs. Dospil remained in Virginia with their youngest son. During the time the parties were physically separated, Ms. Dospil discovered some e-mail traffic between Mr. Dospil and other women and became very upset. She told him she did not want to be with him anymore and did not want to move to Nashville. After the parties' youngest son graduated from high school, Ms. Dospil stated she was not moving to Nashville but wanted to go to Turkey and get involved in a business there. She told Mr. Dospil that before she left, she wanted to have an agreement that would provide for her support. According to Mr. Dospil the parties discussed what the Agreement would contain. She originally demanded all his military retirement pay, but when he refused, she accepted half. Mr. Dospil agreed to giving her one-half the proceeds from the sale of the home and one-half of his 401 (k) plan. Ms. Dospil also demanded that she get half of the RenTech stock. Mr. Dospil testified that he actually did not own any RenTech stock at the time but his employment agreement provided that he would receive two percent of the outstanding stock after the end of his first year, two percent at the end of

the second year and one percent following the third year for a total of five percent. At the time of trial, he owned that amount.¹ Mr. Dospil testified he made notes of what they agreed to and gave them to their Virginia attorney. The attorney drew up the Agreement and Mr. Dospil presented it to Ms. Dospil.

When they received the Agreement from the Virginia attorney, Ms. Dospil asked if everything was in it that they had talked about. At the time the Agreement was signed the only assets the parties owned was the furniture in their home and the house that was encumbered with two mortgages. Mr. Dospil had about \$40,00 in several 401 (k) plans, \$10,000 that he had inherited from his grandfather, and \$33,000 that he had inherited from his father. Mr. Dospil testified that he was not aware of any marital assets that were not mentioned in the Agreement. He denied telling Ms. Dospil that if she didn't sign the Agreement, he would get a divorce and she would get nothing. Since the execution of the Agreement, Mr. Dospil has abided with its provisions.

Mr. Dospil testified that Ms. Dospil has never actually moved to Nashville. She accompanied Mr. Dospil when he initially moved to Nashville, helped him get situated in his apartment, and then returned to Virginia with their son. When the parties sold their Virginia residence, Ms. Dospil came to Tennessee to help move the remaining furniture into storage. Ms. Dospil remained in Tennessee for two days and returned to Virginia.

When Mr. Dospil came to Nashville to work for RenTech, he was promised a salary of \$50,000 and then after three months an increase to \$60,000. According to Mr. Dospil, the company ran into trouble and he was forced to take a salary cut to \$48,000 for the next two years. Then, in 2005, the company began to turn around and he was able to get a higher salary. Mr. Dospil's federal income tax return for 2005 indicated that he received \$96,515.42 as a gross income and \$33,528.00 in retirement benefits. In 2004, his income tax return indicated he had a total of \$105,654.00 in income including \$66,652 from his employment and \$32,652 in employment benefits. In 2003, he had a total income of \$72,688, including \$43,443 from his employment and \$31,992 in retirement benefits. Mr. Dospil's current base salary is \$6,788.12 per month exclusive of profit sharing. In addition, RenTech provides him a vehicle and a cell phone. His military retirement benefit is now \$2,908 per month.

Mr. Dospil admitted that as of the date of trial he had property with a value totaling \$185,826.46. He indicated that was not, however, his net worth because he owed creditors about \$43,000 related to putting his sons through college. He testified he also owed his mother \$65,000, had \$33,000 in stock brokerage margin debt and had \$10,000 in credit card debt.

d. The trial court's ruling

¹ At the time of trial, there was a contract for the sale of RenTech. Mr. Dospil testified that if the sale closes, Ms. Dospil would receive \$78,745.68 for her one-half of Mr. Dospil's interest.

In a bifurcated hearing, the trial court, on March 28, 2006, determined the Agreement was valid and enforceable . The trial court found there was “no intimidation or duress of any type” that would void the Agreement. The trial judge was of the opinion that Mr. Dospil did nothing to force his wife to sign the Agreement and that it appeared she consulted with an attorney prior to signing it based upon her testimony that the lawyer advised her not to sign the Agreement rather than advising she have it set aside. The trial judge described Ms. Dospil as a “learned woman” who had lived apart from her husband for a period of time prior to signing the Agreement and had learned to live on her own. The trial court found the Agreement to have been to the advantage of Ms. Dospil at the time it was signed although it might not be to her advantage at the time of trial. Accordingly, the trial court found the Agreement to be enforceable.

At a subsequent hearing held May 16, 2006, the trial court found that Mr. Dospil’s income had increased approximately sixty thousand dollars a year between the date the Agreement was signed and the trial of the case. It therefore modified the spousal support provisions to provide that Mr. Dospil pay \$2,250.00 per month as alimony *in futuro* and maintain health insurance for the benefit of Ms. Dospil until the death of either party or she qualifies for Medicare or Medicaid. Finally, trial court ordered Mr. Dospil to pay Ms. Dospil an attorney’s fee of \$10,000.00 as alimony *in solido*. The final decree of divorce was entered by the trial court on June 29, 2006.

Both parties have appealed. Mr. Dospil alleges the trial court erred by reforming the Agreement to require Mr. Dospil to provide for medical insurance beyond the time provided for in the Agreement and by requiring him to pay Ms. Dospil’s attorney fees. Ms. Dospil has appealed alleging the trial court erred in upholding the Agreement and in failing to equally divide the assets owned by the parties at the time of trial.

II. STANDARD OF REVIEW

The standard of review of a trial court sitting without a jury is de novo upon the record. Wright v. City of Knoxville, 898 S.W.2d 177, 181 (Tenn. 1995). The trial court’s findings of fact are presumed correct and will not be overturned on appeal unless the evidence preponderates against them. Tenn. R. App. P. 13(d); Kirkpatrick v. O’Neal, 197 S.W.3d 674, 678 (Tenn. 2006); Bogan v. Bogan, 60 S.W.3d 721, 727 (Tenn. 2001). Because trial courts are in a far better position than this court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses’ testimony lies in the first instance with the trial court. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995); Whitaker v. Whitaker, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). Consequently, where issues of credibility and weight of testimony are involved, appellate courts will accord considerable deference to the trial court’s factual findings. Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999); Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998). No presumption of correctness attaches to the trial court’s conclusions of law. S. Constructors, Inc. v. Loudon County Bd. of Educ., 58 S.W.3d 706, 710 (Tenn. 2001).

III. ANALYSIS

a. Validity of the Agreement

Postnuptial agreements have been recognized in Tennessee, and are to be interpreted and enforced as any other contract. In re Estate of Wiseman, 889 S.W.2d 215, 217 (Tenn. Ct. App. 1994); Gilley v. Gilley, 778 S.W.2d 862, 863 (Tenn. App. 1989). Because of the confidential relationship which exists between husband and wife, postnuptial agreements are, however, subjected to close scrutiny by the courts to ensure that they are fair and equitable. Bratton v. Bratton, 136 S.W.3d 595, 601 (Tenn. 2004). They are considered by the courts to be in the nature of prenuptial or antenuptial agreements and should generally be governed by the same principles. In re Estate of Wiseman, 889 S.W.2d at 217; Gilley, 778 S.W.2d at 863. The prerequisites for antenuptial agreements are provided for by Tennessee Code Annotated section 36-3-501. This Code section provides:

Enforcement of antenuptial agreements. -- Notwithstanding any other provision of law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage which is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined in the discretion of such court to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse.

Thus, postnuptial agreements must be freely and knowledgeably executed by both spouses in good faith and without duress or undue influence affecting either spouse. Mosley v. Mosley, No. 2003-01685-COA-R3-CV, 2004 WL 2439294, at *8 (Tenn. Ct. App. 2004).

Ms. Dospil takes the position on this appeal that the Agreement should not be enforced because there was no disclosure of assets, an asset listed in the Agreement did not exist at the time of the divorce, and it was signed by Ms. Dospil under duress. The trial court found, however, that Ms. Dospil was a “learned woman” and was “well informed” regarding the assets owned by the parties at the time the Agreement was signed. Mr. Dospil testified the Agreement dealt with all marital property owned by the parties at the time. While Mr. Dospil had accumulated additional property between the execution of the Agreement and the trial, the trial court specifically found the Agreement was to Ms. Dospil’s advantage at the time she signed it.

The trial judge found Ms. Dospil executed the Agreement without “intimidation or duress of any type.” The trial court indicated it believed Ms. Dospil had, in fact, requested the Agreement be prepared and that she consulted an attorney regarding it prior to its execution. There was evidence before the trial court that the parties negotiated the terms of the Agreement at some length.

Finally, Ms. Dospil takes the position the Agreement should be set aside because it refers to a 401k account that was non-existent at the time of trial. Mr. Dospil testified the 401k account had been converted to an Individual Retirement Account (IRA) containing approximately \$66,000.00. The trial court apparently accepted this testimony and divided the IRA equally between the parties by Qualified Domestic Relations Order.

We are unable to find the evidence preponderates against the findings of the trial court as outlined above, especially in view of the deference we must afford the trial court when evaluating the credibility of witnesses. We, therefore, affirm the trial court's judgment that the Agreement is valid and enforceable.

b. Modification of the Agreement

Mr. Dospil alleges on this appeal that the trial court erred by modifying the terms of the Agreement by changing its provision relating medical insurance and awarding Ms. Dospil an attorney's fee in the amount of \$10,000.00 as alimony *in solido*. The Agreement contains the following provision:

Husband further agrees that, so long as he is employed full time where the employer offers health care benefits, to pay for Wife's health insurance premiums throughout the term of this Agreement.

The trial court modified this provision by ordering:

Husband is to provide COBRA insurance for the benefit of the Wife as alimony for as long as allowable under law. Moreover, the Court specifically finds that healthcare for the Wife is a form of alimony for the Wife's health and support and is therefore an adjustable contract provision by this Honorable Court. Therefore, the Court Orders that the Husband's obligation to provide health insurance for the Wife shall continue until the death or remarriage of the Wife or the death of Husband or until Wife qualifies for Medicare or Medicaid, whichever occurs first. The Court Orders that if at any time in the future the Wife does not have COBRA coverage, the Husband shall be responsible for providing health insurance for the Wife in the same amount of coverage that she has through the company policy on which the Wife is presently enrolled. The Husband shall provide said health insurance or he shall pay one hundred percent (100%) of her medical bills so long as the lack of said health insurance coverage is through no fault of the Wife by the Wife failing to complete the application by the due date.

The trial court also ordered that, "due to the economic disparity between the parties and the amount of assets that the parties each have, the Wife is heretofore awarded an attorney fee in the amount of ten thousand dollars (\$10,000.00) and same shall be deemed alimony in solido and reduced to judgment for which execution may enter." The Agreement contains no mention of an alimony *in solido* award but does provide that after the date of the agreement, each party would be solely responsible for any debts incurred by them.

With respect to modification, the principles relating to marital dissolution agreements apply. When determining whether a provision for payments in such an agreement is modifiable, the first step is to determine whether the payments constitute alimony *in futuro* or something else such as

alimony *in solido* or a division of property. Towner v. Towner, 858 S.W.2d 888, 890 (Tenn. 1993). Statutory issues within a marital dissolution agreement, such as child support during minority and alimony *in futuro*, lose their contractual nature when incorporated into a decree of divorce and become a judgment of the court. Towner v. Towner, 858 S.W.2d 888, 890 (Tenn. 1993) (citing Penland v. Penland, 521 S.W.2d 222, 224 (Tenn. 1975)). The reason for stripping the agreement of the parties of its contractual nature is the continuing statutory power of our courts to modify its terms when changed circumstances justify. Thus, only that portion of such an agreement dealing with the legal duty of child support, or alimony *in futuro* over which the court has continuing statutory power to modify, loses its contractual nature when merged into a decree for divorce. Id. The trial court has the power and discretion to modify terms contained in such an agreement relating to these issues. Archer v. Archer, 907 S.W.2d 412, 418 (Tenn. App. 1995). On issues other than child support during minority and alimony *in futuro*, the agreement retains its contractual nature and is enforceable in the same manner as other contracts. See Towner, 858 S.W.2d at 888; Blackburn v. Blackburn, 526 S.W.2d 463, 465 (Tenn. 1975).

The provision for payment of Ms. Dospil's medical insurance premiums contained in the agreement is not alimony *in solido* because the amount of the premium was not stated and the Agreement contains contingencies that render the total amount of support indefinite. Waddey v. Waddey, 6 S.W.3d 230, 232 (Tenn. 1999). Alimony *in solido* is an award of a definite sum of money that can be calculated at the time of the award. Burlew v. Burlew, 40 S.W.3d 465, 471 (Tenn. 2001); Bryan v. Leach, 85 S.W.3d 136, 146-47 (Tenn. Ct. App. 2001). Because Mr. Dospil's obligation to pay Ms. Dospil's health insurance premiums were in an unstated amount and were contingent upon his remaining employed on a full-time basis and his employer providing medical insurance benefits, the amount of Mr. Dospil's obligation was not calculable and was subject to modification by the trial court pursuant to Tennessee Code Annotated section 36-5-121(f)(2)(A) upon a showing of substantial and material change of circumstances. See Dunn v. Duncan, No. M2004-02216-COA-R3-CV, 2006 WL 1233046, at *4 (Tenn.Ct.App. May 8, 2006).² We agree with the trial court on this issue.

Mr. Dospil asserts that even if the provision for payment of insurance premiums is modifiable, the trial court should have fixed some definite amount for insurance that should have been paid to Ms. Dospil. We agree. Tennessee Code Annotated section 36-5-121(a) gives the trial court in a divorce action the authority to award alimony. That Code section provides that "[t]he court may fix some definite amount or amounts to be paid in monthly, semimonthly or weekly installments, or otherwise, as the circumstances may warrant." At trial, Mr. Dospil offered evidence that he could obtain healthcare coverage for Ms. Dospil through the Tri-Care and Humana Military Continued Health Care benefit program at a cost of \$933.00 per quarter. The trial court gave Ms. Dospil the option of accepting the Tri-Care coverage and maintaining her current coverage provided

²There was no real issue between the parties that there had been a substantial and material change of circumstances between the date of the agreement and the trial of the case. As indicated above, Mr. Dospil earned a total of \$72,688 during 2003, the year the agreement was executed. In 2005, his income totaled \$130,043.42.

by Mr. Dospil's employer through COBRA. No evidence was presented regarding to cost of maintaining the current coverage.

Moreover, the trial court ordered that at the time Ms. Dospil is no longer eligible for COBRA, Mr. Dospil must obtain and pay the premiums for similar medical insurance coverage. Ms. Dospil related a list of ailments from which she suffers. There was no evidence presented to the trial court concerning the costs of obtaining private medical insurance for Ms. Dospil or even if she is insurable in her condition. Whether Ms. Dospil is insurable has further significance. The trial court in its order imposed a penalty provision that if Mr. Dospil failed to provide medical insurance, he would be liable for Ms. Dospil's medical expenses. At the end of Ms. Dospil's COBRA eligibility, if she is uninsurable, Mr. Dospil would, under the terms of the Final Decree of Divorce, be liable for her medical expenses even though obtaining medical insurance may be an impossibility. We would also note that Tennessee Code Annotated section 36-5-121(a) provides that an alimony award "may be enforced by any appropriate process of the court having jurisdiction including levy of execution." The penalty provision imposed by the trial court exceeds the method of enforcement authorized by statute.

We remand the case to the trial court to fix the amount of Mr. Dospil's obligation for maintaining medical insurance for the benefit of Ms. Dospil. While not required, we think it would be preferable if this amount is paid directly to Ms. Dospil and that she be responsible for paying her medical insurance premium.

The trial court awarded Ms. Dospil an attorney's fee in the amount of \$10,000.00 as alimony *in solido*. The Agreement contained no provision for alimony *in solido*. The award was contrary to the Agreement in that it provided each party would be responsible for debts incurred by them after the date of its execution. Alimony *in solido* is not modifiable even upon a showing of changed circumstances, including such events as remarriage or the increased fortunes of one of the spouses. Self v. Self, 861 S.W.2d 360, 362 (Tenn. 1993) ; Towner, 858 S.W.2d at (Tenn. 1993); Grisson v. Grissom, 15 S.W.3d 474, 477 (Tenn. Ct. App. 1999). As a result, the trial court's award of an attorney's fee of \$10,000.00 as alimony *in solido* is vacated and set aside.

IV. CONCLUSION

The judgment of the trial court that the Agreement is valid and enforceable is affirmed. The trial court's determination that the Agreement be modified to require Mr. Dospil pay Ms. Dospil's medical insurance premiums until the death of one of the parties, she remarries or becomes eligible for Medicare or Medicaid is affirmed, in part, but is remanded to the trial court for determination of a fixed amount of that obligation. The penalty provision imposed by the trial court for failure to maintain medical insurance is set aside. The award by the trial court of an attorney's fee in the amount of \$10,000.00 as alimony *in solido* is reversed. The costs of this appeal shall be assessed one-half to Mr. Dospil and one-half to Ms. Dospil.

DONALD P. HARRIS, SENIOR JUDGE